PUBLIC PROSECUTOR

v.

DARMALINGAM R. KANDIAH

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[FT CRIMINAL APPEAL NO. 52-25-1986]
18 MARCH 1987

CRIMINAL LAW: *Sentencing - Drug offence - Principles to be applied - Whether sentence inadequate.*

This was an appeal by the Public Prosecutor against the sentence imposed by the Sessions Court. The respondent was found guilty of a charge under s. 12(2), Dangerous Drugs Act 1952 for having under his control 9.39 grammes of heroin and sentenced to five years imprisonment with six strokes of whipping. The prosecutor had not pressed for a deterrent sentence.

Held:

[1] It was immaterial that the prosecution had not pressed for a deterrent sentence. The lower Court failed to consider the question of public interest. The gravity of the offence was reflected in the maximum and minimum sentences prescribed by the legislation in s. 39A, Dangerous Drugs Act, 1952. The amount of heroin found in the respondent's control was almost twice the minimum amount prescribed in the said provision. The sentence was enhanced to ten years imprisonment with twelve strokes of whipping.

[Appeal allowed.]

Cases referred to:

New Tuck Shen v. Public Prosecutor [1982] CLJ (Rep) 606
Public Prosecutor v. Chew Ah Hock [1956] 22 MLJ 67
R. v. Teo Cheng Lian [1949] 15 MLJ 170
Public Prosecutor v. Fam Kim Hock [1957] 23 MLJ 20
Public Prosecutor v. Loo Choon Fatt [1976] 1 MLJ 256
Public Prosecutor v. Khairuddin [1982] CLJ (Rep) 234
R. v. Kenneth John Ball 35 Cr App R 164
Abu Bakar bin Alif v. R. [1953] 19 MLJ 19
Public Prosecutor v. Yeoh Eng Khuan [1976] 1 MLJ 238
Loh Hock Seng & Anor. v. Public Prosecutor [1980] 2 MLJ 13

Legislation referred to:

Dangerous Drugs Act 1952, ss. 12(2), 39A

For the public prosecutor - Adlan bin Abdul Halim, DPP
For the accused - M.A. Vadiveloo; M/s. Veloo & Co.

JUDGMENT

Zakaria Yatim J:

The respondent was charged in the Sessions Court, Kuala Lumpur for having under his control fourteen plastic packets of heroin weighting 9.39 grammes, an offence under s. 12 (2) of the Dangerous Drugs Act 1952 and punishable under s. 39A of the same Act. The respondent claimed trial and at the conclusion of the trial the President found him guilty on

the charge. The President convicted him and sentenced him to five years imprisonment with effect from the date of arrest and in addition punished him with six strokes of whipping.

The Public Prosecutor appealed against the sentence passed by the President.

The President stated his grounds of judgment in one sentence in the following words:

> With respect mindful as I am of accused's previous conviction (P11), Arrest case ACD0440/ 1985 being taken into consideration under s. 171 ACPC, I think the sentence though the minimum 5 years and 6 strokes whipping is adequate.

At the hearing of the appeal the Deputy Public Prosecutor submitted that the President, in his grounds of judgment, failed to take into account the element of public interest involved in the case; the substantial amount of heroin found in the appellant's control; and the provisions of s. 39A, which provides for a term of imprisonment for life and minimum of five years imprisonment and a whipping of not less than six strokes. According to the Deputy Public Prosecutor, the sentence passed was the minimum and in view of the circumstances of the case the sentence was manifestly inadequate. He asked the Court to enhance the sentence.

Counsel for the respondent, Mr. Vadiveloo told the Court that the Deputy Public Prosecutor must show that the sentence was manifestly inadequate. He added that the prosecution did not press for a deterrent sentence in the lower Court.

I shall first deal with the second point raised by Mr. Vadiveloo, that is the Prosecuting Officer did not urge the President to pass a deterrent sentence. It is true that on the question of sentence the Prosecuting Officer merely said, "Leave it to Court." (p. 37 of the Appeal Record). In my opinion, the Prosecuting Officer had done the right thing to leave the matter of sentence to the Court. Sentences are within the absolute province of the Court. *New Tuck Shen v. Public Prosecutor* [1982] CLJ (Rep) 606 @ 609. The mere fact that the prosecution does not address the Court on the question of the amount of sentence to be awarded is, therefore immaterial. *Public Prosecutor v. Chew Ah Hock* [1956] 22 MLJ 67.

The question for the Court to consider now is whether the sentence passed by the President is a proper sentence. Normally, an appeal Court will not interfere with the discretion of the Court below in regard to sentences. There must be a manifest error, either in law or in considering the circumstances of the case or an omission to consider the facts and circumstances before this Court interferes with the discretion of the President. See *R. v. Teo Cheng Lian* [1949] 15 MLJ 170. See also *Public Prosecutor v. Fam Kim Hock* [1957] 23 MLJ 20.

In my opinion the President had omitted to consider an important point in his grounds of judgment, namely, he failed to consider the question of public interest. Hashim Yeop Sani J as he then was, in *Public Prosecutor v. Loo Choon Fatt* [1976] 1 MLJ 256, said:

> One of the main considerations in the assessment of sentences is of course the question of public interest.

In that case the learned Judge was considering the appropriate sentence in respect of an offence under s. 12(2)of the Dangerous Drugs Ordinance, 1952. In *Public Prosecutor v. Khairuddin* [1981] CLJ (Rep) 234 @ 237, Mohammed Azmi J as he then was, said:

> In this case, I am of the view that the learned President had taken the fact of full restitution made by the accused as the major ground for imposing fines and one day's imprisonment, **without sufficient regard to public interest** ... I am of the view that the sentences imposed

by the learned president erred in principle. In assessing sentence, a Court has the discretion to be lenient and merciful provided there are extenuating circumstances **and it is in the public interest to do so ... Public interest demands that cases of this nature involving persons in position of trust, particularly in financial institutions must be dealt with severely,** in the hope that the would-be offenders would be deterred.

[Emphasis added].

The importance of considering the question of public interest when passing sentence has been stressed by Hilbery J in *R. v. Kenneth John Ball* 35 Cr App R 164. In his judgment (pp. 165 and 166), the learned Judge said:

In deciding the appropriate sentence Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seemingly to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is indeed to turn from criminal ways to honest living. Our law does not, therefore fix the sentence for a particular time, but fixes a maximum sentence and leaves it to the Court to decide what is within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

The passage quoted above has been applied by our Court in *Loh Choon Fatt's* case, *supra.*, and in *Abu Bakar bin Alif v. R.* [1953] 19 MLJ 19. The essence of the passage quoted above, if I understood the learned Judge correctly, is that a proper sentence serves the public interest if the sentence serves as a deterrence to others as well as the particular criminal against whom the sentence is passed.

In the instant case the offence committed is under s. 12(2) of the Dangerous Drugs Act, 1952 and the maximum punishment under s. 39A is life imprisonment as well as whipping of not more than twenty-four strokes (See s. 288(1) of the Criminal Procedure Code). The minimum punishment prescribed by s. 39A is five years imprisonment and whipping of not less than six strokes.

This is indeed a very serious offence. The gravity of this type of offence was described by Abdoolcader J as he then was, in *Public Prosecutor v. Yeoh Eng Khuan* [1976] 1 MLJ 238. The learned Judge said:

Drug taking is a menace and drug trafficking and pushing is becoming so rampant. Persons indulging in such activities are a scourge to society and unless the courts consider deterrence and the public interest as vital factors in sentencing, what would result would be a virtual licence for the kingpins of organisations in the drug trade to use young persons as a front not only in the hope that they themselves would escape punishment but also that the age of these hench-boys would deter the courts from sending them to prison. Unless the courts take a firm stand in the matter the whole purpose of the legislature in enacting in its wisdom s. 39A of the Ordinance which imposes a minimum mandatory term of imprisonment of 3 years and a maximum of 14 years would be lost.

It should be noted that the learned Judge was referring to the old s. 39A, before it was amended. In *Loh Hock Seng & Anor. v. Public Prosecutor* [1980] 2 MLJ 13. Raja Azlan Shah CJ (Malaya), as he then was, in delivering the judgment of the Federal Court said at p. 14:

> Notwithstanding the several convictions for trafficking in drugs that have been secured, the rampancy of this type of offence still continues unabated with sequential impetus to related offences under the Ordinance, and in view of the current and continuing upsurgence of indulgence in dangerous and deleterious drugs and offences relating to and connected therewith, we feel the time has now come for some more vigorous element of deterrence to be brought to bear upon those trafficking in drugs, both active and potential, who are no less than engineers of evil and pedlars of death, to the intent and extent that intending offenders should be made to desist and be deterred, that those one step ahead and in the course of promoting or participating in such heinous activity should realise the extremely grave consequences they face, stop dead in their tracks, repent and resile, and that those who, notwithstanding still pertinaciously persist and have the misfortune of being apprehended, should know they are in for the punishment prescribed by law to fit the crime.

In *Loo Choon Fatt's* case, *supra.,* Hashim Yeop Sani J traced the gradual change in the attitude of Parliament as reflected in the various amendments made to the Dangerous Drugs Act 1952. The learned Judge rightly stated that each time the Act was amended the penalties attached to the various offences under the law were enhanced. The learned Judge went on to state at p. 257 of his judgment:

> It is common sense to say that behind these legislative exercises was the government's realization albeit gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.
>
> The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the Courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed or if the sentence appears to defeat the object of the statute. This is not saying that the Courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

In view of the passages quoted above, public interest plays a dominant role when the Court is exercising its discretion in considering the appropriate sentence in a case under the Dangerous Drugs Act.

Apart from the public interest, another important factor which the Court must consider is the quantity of the heroin found in the control of the respondent. According to the evidence the amount of heroin found in his control was 9.39 grammes. Under s. 39A an offence is punishable by that section if the weight of the heroin is five grammes or more. The amount of heroin found in the control of the respondent was almost twice as much as the minimum amount prescribed in the s. 39A. This point, too, was not considered by the President in his grounds of judgment.

In view of the failure on the part of the President to consider, in his grounds of judgment, the question of public interest and the amount of heroin found with the respondent, in my opinion the President has erred in exercising his discretion when he sentenced the respondent. His decision on sentence in this case is manifestly wrong. It is therefore, an appropriate case for this Court to interfere with the discretion of the President.

I have considered all the circumstances in this case, including the question of public interest, the quantity of the heroin found and the gravity of the offence as well as the respondent's plea in mitigation. There are no extenuating circumstances in this case. I accordingly order

that the sentence imposed by the President, that is, five years imprisonment and six strokes of whipping be enhanced to ten years imprisonment with effect from the date of arrest and twelve strokes of whipping.

Also found at [1988] 1 CLJ 840